Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,	
Complainant,	PERB Case Nos. 07-U-49, 08-U-13, and 08-U-16
v.	Opinion No. 1302
District of Columbia Metropolitan Police Department,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

This case involves three consolidated Unfair Labor Practice Complaints ("Complaints") filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("Complainant", "FOP" or "Union") against the District of Columbia Metropolitan Police Department ("Respondent" or "MPD"). In each of the Complaints, the Union alleges that MPD violated D.C. Code § 1-617.04(a)(1) and (5)[1] of the Comprehensive Merit Personnel Act

[1] § 1-617.04. Unfair labor practices.

(a) The District, its agents, and representatives are prohibited from:

(1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

* * *

(5) Refusing to bargain collectively in good faith with the exclusive representative.

("CMPA") by failing to comply with, or respond to the Union's requests for information. The consolidated complaints are as follows:

PERB Case No. 07-U-49:

> The Union contends that the District of Columbia Metropolitan Police Department ("Department") committed an Unfair Labor Practice by refusing to provide information requested by Officer Cunningham concerning the Department's disciplinary action against Sergeant Kimberly Taylor.

(Complaint/PERB Case No. 07-U-49 at p. 1).

PERB Case No. 08-U-13:

> The Union contends that the District of Columbia Metropolitan Police Department ("Department") committed an Unfair Labor Practice by refusing to provide information requested by the Chairman of the Fraternal Order of Police, Kristopher K. Baumann, concerning a Departmental disciplinary matter.

(Complaint/PERB Case No. 08-U-13 at p. 1).

PERB Case No. 08-U-16:

> The Union contends that the District of Columbia Metropolitan Police Department ("Department") committed an Unfair Labor Practice by failing to provide information concerning the administrative investigation relating to Lieutenant Robert Glover, and for failing to provide the requested information for the Department's written policy addressing waiver requests for shaving.

(Complaint/PERB Case No. 08-U-16 at p. 1).

The Respondent filed Answers to the Complaints ("Answers") alleging that because the Union's requests for information present a contractual dispute, the Public Employee Relations Board ("Board") lacks jurisdiction over the matters raised in the complaints. In addition, the Respondent contends that it did not commit an unfair labor practice by denying the Union's requests for information.[2]

[2] MPD asserted that its reasons for denying the requests for information were due to the privileged or confidential nature of the information requested. (See MPD's Answers to Complaints PERB Case Nos. 07-U-49, 08-U-13 and 08-U-16). In addition, MPD claimed that concerning the allegations in in PERB Case No. 08-U-16, that it did supply some of the requested information, and that there is no factual basis for the complaint. (See Answer to Complaint/ PERB Case No. 08-U-16 at p. 8).

Hearings were held in this matter on March 25, and May 19, 2008. In addition, the parties submitted post-hearing briefs. Hearing Examiner Sean Rogers issued his Report and Recommendation ("R&R") on October 24, 2008, concluding that the Board does have jurisdiction over the Union's Complaints and that MPD violated D.C. Code § 1-617.04(a)(1) and (5) of the CMPA by either refusing to comply with, or respond to, the Union's requests for information, except for certain information described in Complaint/PERB Case No. 08-U-16. (See R&R at p. 17). As a result, the Hearing Examiner recommended that MPD be ordered to cease and desist from refusing to comply with, or respond to, the Union's requests for information, and release the requested information to the Union. (See R&R at p. 25). The Hearing Examiner also recommended that MPD be ordered to post a notice of the violations. (See R&R at p. 25). Whereas the Hearing Examiner found no violation as to a portion of the requested information described in PERB Case No. 08-U-16, he recommended that this portion of PERB Case No. 08-U-16 be dismissed.

The Respondent filed Exceptions to the Hearing Examiner's R&R. The Complainant filed an Opposition to the Respondent's Exceptions. The Hearing Examiner's R&R, MPD's Exceptions and the Union's Opposition are before the Board for Disposition.

II. Background

The Hearing Examiner made the following factual findings regarding the Complaints:

A. Complaint/PERB Case No. 07-U-49

> In June 2007, a First District gun inventory revealed that Sergeant Kimberly Taylor, while in a less-than-full duty status, had not turned in her service weapon to the station as required by MPD work rules. Moreover, Taylor was not carrying her service weapon while on duty. Assistant Chief Diane Groomes directed that Taylor turn in her service weapon before noon that day. Based on Taylor's apparent violation of MPD work rules, Groomes ordered a disciplinary investigation which was delegated to Lieutenant Barbara Hawkins. A June 4, 2007 first-draft of Hawkins' memorandum of investigation was submitted to Groomes on June 5, 2007. Hawkins recommended that Taylor be disciplined with a Derelictions Report (also known as a *PD 750* after the MPD form number). A *PD 750* is the lowest form of recorded MPD discipline and is also known as a "corrective action."
>
> Groomes reviewed Hawkins' first-draft and she noted what she thought were deficiencies including: no statement from Groomes as the complainant; no indication of the location of Taylor's service weapon; and no explanation of why Taylor's

service weapon was at her home. Groomes noted that, while Hawkins' investigation identified two potential MPD General Order (GO) violations by Taylor, Hawkins addressed only one of the potential violations. In addition, despite the potential of two GO violations, Groomes noted, Hawkins recommended the lowest corrective action for Taylor, a *PD 750*. Groomes' notation on Hawkins' first-draft were marginal and handwritten. Groomes returned the marked up first-draft to Hawkins. Among Groomes' marginal, handwritten notations, she wrote that, based on the additional deficiencies and Taylor's supervisory position, Groomes thought that an *Official Reprimand*, a higher form of discipline than Hawkins' recommended *PD 750*, was appropriate. Groomes did not retain a copy of Hawkins' marked up first-draft.

The record suggests that Hawkins prepared at least two more drafts dated June 14 and 19, 2007, and there may have been more drafts. The existence of these earlier drafts was revealed within the date of the June 19, 2007 final-draft which noted: "Rvsd: June 14, 2007" and "Rvsd. June 19, 2007". Hawkins' final-draft incorporated Groomes' marginal, handwritten notes from the first-draft including the increase in recommended discipline for Taylor from a *PD 750*, the lowest level of recorded discipline, to an *Official Reprimand*, a higher level of discipline.

On June 20, 2007, Groomes signed off on the investigation and the *Official Reprimand* discipline, and transmitted the documents to her supervisor, Assistant Chief Brian Jordan. Jordan approved the disciplinary recommendation for Taylor to receive an *Official Reprimand.*

On July 5, 2007, pursuant to the Parties' collective bargaining agreement (CBA), Groomes conducted a disciplinary commander's resolution conference which constituted Taylor's appeal of the *Official Reprimand.* Taylor and FOP Vice Chairman Wendell Cunningham received a copy of the final investigative report with the revised date notations, and the recommendation for an *Official Reprimand.* Asserting FOP's rights under CBA, Article 10, Cunningham demanded that Groomes provide the FOP with the earlier drafts of the investigation. At [the] hearing, FOP witnesses testified that Groomes said the Union was not entitled to the documents, but the MPD argues that Groomes said she did not have the earlier drafts. The MPD asserts that Groomes said the FOP could obtain the documents from Hawkins.

On July 9, 2007, Cunningham submitted a written request for information (RFI) pursuant to CBA, Article 10 to Jordan for copies of Hawkins' earlier investigative report drafts. Specifically, Cunningham's RFI states, in pertinent part:

> This letter serves as a formal request for documents and information in the possession, custody, or control of the Metropolitan Police Department (MPD). The Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP), is requesting the following documents.
>
> The FOP/MPD Labor Committee is currently representing Sergeant Kimberly Taylor of I-D, for her Official Reprimand appeal to the Chief of Police. On Thursday July 5, 2007, at approximately 0945 hours, Sergeant Taylor, along with her Union representative Wendell Cunningham, met with Commander Diana Grooms in her office for a Commander Resolution Hearing. Sitting in, was Captain Jeff Brown. During our meeting, we noticed in the investigation write-up in two places, the paper work indicated the word, "revised." I then said to the Commander, "I noticed in the Investigation paper-work it indicates "revised" on June 14, 2007, and June 19, 2007; and I would like to see those revised documents and the document dated June 4th." She responded by stating, "no," because "we were not entitled to the documents." She went on to say that the "revised documents" are notes she wrote to Lieutenant Hawkins "suggesting her opinion," but it appears to us, that the notes were instructions on how to proceed with the investigation. The Commander did state, that at no time did she tell or suggest to Lieutenant Barbara Hawkins to her [sic] to change the investigation from a 750 to an Official Reprimand.
>
> We believe that the Official Reprimand that Commander Grooms gave to Sergeant Taylor was too harsh. We also think she may have told the Lieutenant what she would like to see in her outcome of the investigation. In defending Sergeant Taylor, we strongly believe that these documents which Commander Diana Grooms has in her . . .

> [possession] are critical evidence for exonerating Sergeant Taylor. We are requesting the document dated June 4th, 2007, and all "revised documents" June 14, 2007, June 19, 2007 and any other documents that Commander Grooms, Lieutenant Barbara Hawkins, and Captain Jeff Brown may have pertaining to this case, be made available to the FOP Union.

On or about July 12, 2007, Jordan denied the FOP's request for information. Jordan's denial letter states, in pertinent part:

> . . . I hereby respectfully deny your request based on the following reasons:
>
> 1. The documents requested, although the documents may or may not exist, are notes or comments which are a part of the deliberative and pre-decisional process and are excluded from the final investigative package. All final documents that made up the final report on the incident were included in the package submitted to the Office of Professional Responsibility.

Despite MPD's denial of FOP's information request, FOP obtained the earlier drafts from sources which were not revealed at hearing. The FOP appealed Taylor's *Official Reprimand* to the Chief of Police. The Chief of Police granted the appeal and rescinded Taylor's *Official Reprimand.*

(R&R at pgs. 2-5) (citations to the transcript and exhibits deleted).

B. <u>Complaint/PERB Case No. 08-U-13</u>

The Union contends that the [MPD] committed an Unfair Labor Practice by refusing to provide information requested by the Chairman of the Fraternal Order of Police, Kristopher K. Baumann, concerning a Departmental disciplinary matter.

On September 11, 2007, FOP Chairman Baumann sent a RFI to Mark Viehmeyer, Director of the Metropolitan Police Department Labor and Employee Relations. The RFI was made pursuant to CBA, Article 10 and stated, in pertinent part:

> The Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP), is requesting documents pursuant to Article 10 of the Collective Bargaining Agreement (Agreement) between the District of Columbia and the FOP, as information necessary for the proper administration of terms of the Agreement. Due to the failure of the Department to produce the below documents as attachments to the Notices of Proposed Adverse Action and the time issues involved (see below), I am sending this request directly to your office for response.
>
> **INFORMATION REQUESTED**
>
> 1. Notes, written transcripts, and any tape recordings produced during interviews of Assistant Chief of Police Winston Robinson and Lieutenant Jude Waddy during the Department's investigation of their off-duty employment for a firm known as "Federal Management Systems" in the country of Guyana. Each official received unspecified disciplinary action in the matter. The DDRO/IS numbers in Assistant Chief Robinson's case are unknown, Lieutenant Waddy's case number is DDRO No. 609-06/1S# 06-001182.
>
> 2. The complete investigative packages, including all memorandum and attachments, for Assistant Chief of Police Robinson and Lieutenant Waddy.
>
> * * *

On August 31, 2007, Sergeant Bertie Shields was served with a Notice of Proposed Adverse Action (DDRO Case No, 400-07/1S# 05001557) alleging similar misconduct.

> Assistant Chief of Police Robinson and Lieutenant Waddy's administrative interviews are directly referenced in the Notices of Proposed Adverse Action for . . . [Shields] and are part of the Department's case against . . . [Shields]. They were not, however, produced by the Department as part of the disciplinary packages. Those interviews are

> necessary for the FOP to assist the members in preparing their defenses.
>
> The disciplinary packages of both Assistant Chief Robinson and Lieutenant Waddy are necessary for the FOP to properly determine the appropriate use of the *Douglas* Factors in this matter. The discipline issued to officials regarding the same set of facts is directly relevant to the discipline issued to members in the matter. In addition, the disciplinary packages of both Assistant Chief Robinson and Lieutenant Waddy are necessary in order for the FOP to ascertain if any other mitigating facts or exculpatory facts were revealed during those investigations.
>
> Baumann never received a response from Viehmeyer.

(R&R at pgs. 5-6) (citations to the transcript and exhibits deleted).

C. <u>Complaint/PERB Case No. 08-U-16</u>

The Union contends that [MPD] committed an Unfair Labor Practice by failing to provide information concerning the administrative investigation relating to Lieutenant Robert Glover, and for failing to provide the requested information for the Department's written policy addressing waiver requests for shaving.

FOP's *Complaint 08-U-16* involves two separate and unrelated RFIs by FOP's Seventh District Shop Steward Hiram Rosario as follows:

First RFI, Complaint 08-U-16:

On September 21, 2007, Rosario sent an RFI to Ira Stohlman, Medical Director of the Police and Fire Clinic (PFC). The RFI stated, in pertinent part:

> Pursuant to Article 10 of the Collective Bargaining Agreement (Agreement) between the government of the District of Columbia and the Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP), I am filing an Article 10 Request with regard to the listed information.

* * *

The specific information and documents sought:

A. The FOP is seeking all documents and information relating to the Police and Fire Clinic's (PFC) Written Policy that requires MPD members seeking shaving waivers, wearing of the soft body armor on the outside, etc. to obtain a letter from their private doctors every six (6) months, while also having to respond to PFC every 6 months. This policy has also affected members who have existing medical conditions, even though there is no cure for these conditions.

Rosario's RFI was based on FOP's questions concerning the shaving waiver policy of the PFC regarding officers with the skin disease *pseudofollicultis barbae* (PFB) and certain other diseases which require waivers of uniform appearance standards. The record established that, at certain levels, PFB is incurable except by growing a beard.

On October 11, 2007, Rosario sent Stohlman an e-mail "requesting for you to look into" Rosario's September 21, 2007 RFI. That day Stohlman responded,

> I did respond to your Article 10 request, and forwarded the response (addressed to you) through Assistant Chief Shannon Cockett.

On October 17, 2007, Rosario sent Stohlman another e-mail asking him if he had "an update on my Article 10 request." Stohlman responded that day stating that he had,

> sent a response to your Article 10 – I can leave a copy here at the Clinic for you to pick-up at your convenience, or mail a copy of what I sent to you *via* Assistant Chief Cockett's office.

Rosario responded by e-mail that day and told Stohlman to mail the RFI response to the FOP office.

Stohlman testified that he responded to Rosario's RFI by sending an October 4, 2007 memorandum through Assistant Chief Shannon P. Cockett, Office of Human Resources Management, with copies to Commander Jennifer Green and Mark Bramow. While the memorandum is initialed by Stohlman it is not initialed by Cockett. Rosario testified that he never received a response to the RFI. Stohlman testified that he made no effort to ensure that Rosario received the RFI response.

Finally, Rosario said that on April 24, 2008, he sent another RFI to Stohlman requesting the same information and documents as in his initial September 11, 2007 RFI. Rosario said he has not received a response to this RFI from Stohlman by mail.

Second RFI, Complaint 08-U-16:

This portion of the FOP's *Compliant 08-U-16* involves two RFI's. The initial RFI is dated August 28, 2007 and the second RFI, a revised, more narrowly drawn version of the first RFI, is dated September 19, 2008.

Turning to the RFI's first version that is the subject of *Compliant 08-U-16*, the record establishes that on August 28, 2007, Rosario's RFI, addressed to Assistant Chief William Ponton, Office of Professional Responsibility, stated, in pertinent part:

> Pursuant to Article 10 of the Collective Bargaining Agreement (Agreement) between the government of the District of Columbia and the Fraternal Order of Police, Metropolitan Police Department Labor Committee (FOP), I am filing an Article 10 Request with regard to the listed information.
>
> * * *
>
> **The specific information and documents sought:**
>
> A. All documents relating to the Department's investigation into Lieutenant Robert T. Glover's conduct for his "Neglect to Make an Arrest for an Offense Committed in his presence (DC Code 5-115.03)."

Rosario's RFI explained that the FOP sought information and documents related to the investigation into the conduct of

> Lieutenant Robert T. Glover for alleged neglect to make an arrest for an offense committed in his presence. The RFI sought information on behalf of Officer Michael Stevens. The FOP asserted that Glover witnessed Stevens allegedly using excessive force during an arrest. The FOP asserted that Glover filed a criminal complaint with the U.S. Attorney based on Stevens' alleged misconduct.
>
> On September 11, 2007, Rosario received a letter from Acting-Assistant Chief Matthew Klein denying the RFI because:
>
> > this incident is a pending criminal matter under review by the United States Attorney's Office. The revelation of *any* investigatory information concerning this matter would interfere with the enforcement procedures (D.C. Code Section 2-534(a)(3)(A).) Therefore, your request for information and documents is denied. (Emphasis in original).
>
> On September 19, 2007, following Klein's denial, Rosario revised his RFI and submitted to Klein the second RFI that is the subject of *Compliant 08-U-16*, stating, in pertinent part:
>
> > Apparently there was a misunderstanding as to the scope of my request. The FOP is seeking all documents and information related to IS numbers drawn for the incident and an update on the status of any administrative, not criminal, investigation relating to Lieutenant Robert Glover.
>
> Rosario testified that he never received a response to this revised RFI.

(R&R at pgs. 6-9) (citations to the transcript and exhibits deleted).

III. The Hearing Examiner's Recommendations, MPD's Exceptions and FOP's Opposition.

Based on the pleadings, the record developed at the hearings and his consideration of the parties' post-hearing briefs, the Hearing Examiner concluded that: (1) the Board's jurisdiction extends to the Union's Complaints in this matter; (2) the Complainant met its burden of proving the allegations in its Complaints by a preponderance of the evidence, as required by Board Rule 520.11; and (3) that MPD has violated D.C. Code § 1-617.04(a)(1) and (5) by "refusing to provide information relevant and necessary to the Union's statutory roles as the exclusive

representative, except as regards MPD's refusal to provide to the FOP information requested on Lieutenant Robert Glover." (R&R at p. 17, and see R&R at p. 19).

A. The Board's Jurisdiction

In its Answers to the Union's Complaints and in its post-hearing brief, MPD contends that the Board lacks jurisdiction over the matters asserted in the Complaints. Specifically, MPD claims that the Union's requests for information are based on the language in Article 10 of the parties' CBA[3]. (See Respondent's Brief at p. 11). Therefore, the allegations in the Complaints involve a contractual violation and are not within the jurisdiction of the Board. (See Respondent's Brief at p. 11). Furthermore, MPD suggests that Article 10 of the parties' CBA, in conjunction with Article 19 of the parties' CBA (the grievance and arbitration provisions), demonstrate the parties' intention to resolve disputes concerning MPD's statutory obligation to provide requested information by the contractual procedures set out in the parties' CBA. (See Respondent's Brief at p. 11).

In resolving the issue of the Board's jurisdiction, the Hearing Examiner considered the Board's precedent concerning: (1) the obligation of an employer to provide information requested by an exclusive representative under the CMPA; and (2) the Board's distinction between those obligations that are strictly contractual, as opposed to obligations that are statutory without regard to the parties' collective bargaining agreement provisions. (See R&R at p. 17-18).

The Hearing Examiner observed that:

> [t]he Board has developed well established precedent regarding an employer's obligation to provide information to the exclusive representative under the CMPA. (*University of the District of Columbia v. University of the District of Columbia Faculty Association*, 38 D.C. Reg. 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991)(*Case 272*)). In addition, the Board has consistently followed United States Supreme Court precedent holding,
>
> > that an employer's duty to disclose "unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement."[4] (*Fraternal Order of Police/Metropolitan Police Department Labor*

[3] Article 10, Section 1 of the parties' CBA provides:

> The parties shall make available to each other's duly designated representatives, upon reasonable request, any information, statistics and records relevant to negotiations or necessary for proper administration of this Agreement.

[4] See *NLRB v. Acme Industrial Co.*, 385 U.S. 32, 36 (1967).

> *Committee v. District of Columbia Metropolitan Police Department*, Opinion No. 835 at p. 9, PERB Case No. 06-U-10, (*Case 835)*; citing *NLRB v. Acme Industrial Co.*, 385 US 32, p. 36 (1971)).

In addition, the Board has consistently held to the legal standard that,

> [m]anagement's duty to furnish information relevant and necessary to a union's statutory role under the CMPA as the employees' exclusive representative is derived from (1) management's obligation to "bargain collectively in good faith" and (2) employees' right "[t]o engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative[.]" See D.C. Code Sec. 1-[617.01(b)(2) and (c)]. D.C. Code Sec. 1-[617.04(a)(5)] protects and enforces, respectively, these employees' rights and employer obligations by making their violation an unfair labor practice. (*American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, [42 D.C. Reg. 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1992).]

(R&R at pgs. 17-18).

In light the above, the Hearing Examiner remarked that:

> [t]he Board has applied this legal standard by differentiating between a union's [requests for information ("RFIs")] which are ***strictly contractual,*** as opposed to RFIs which are grounded in the CMPA, without regard to the Parties' collective bargaining agreement provisions. Specifically, the Board has held,
>
> > [i]n determining a violation of this obligation [to provide information requested by the union], the Board has always made a distinction between obligations that are statutorily imposed under the CMPA and those obligations that are contractually agreed-upon between the parties. "The CMPA provides for the resolution of the former", we have

> stated, "while the parties have contractually provided for the resolution of the latter, *vis-a-vis*, the grievance and arbitration process contained in their collective bargaining agreement." We have concluded, therefore, that ***we lack jurisdiction over alleged violations that are strictly contractual in nature***. . . . We have reached this conclusion notwithstanding that fact that, absent coverage under provisions of an effective collective bargaining agreement, an unfair labor practice may otherwise lie under the CMPA. (*Case 339*, p. 3-4). (Citations omitted and emphasis added).

(R&R at p. 18).

Based on the foregoing precedent[5], the Hearing Examiner rejected MPD's challenge to the Board's jurisdiction. Specifically, The Hearing Examiner's found that:

> [w]hile CBA Article 10 describes the ***mutual*** obligation to exchange information, the contract provision's mere existence does not remove from PERB's jurisdiction the consideration of the FOP's *Complaints* asserting breaches of MPD's ***statutory duty*** to furnish relevant and necessary information under the CMPA. Therefore, MPD's challenge to the PERB's jurisdiction over the FOP's ULPs is without merit and the PERB has jurisdiction over the statutory violations the FOP asserts were committed by MPD in these three ULP cases.

Having determined that the Complaints are properly within the Board's jurisdiction, the Hearing Examiner considered whether MPD's failure to comply with the Union's requests for information were in violation of MPD's statutory obligations. However, before reviewing the Hearing Examiner's conclusions and recommendations concerning merits of the Complaints, the Board will address MPD's exceptions to the Hearing Examiner's resolution of the jurisdictional issue.

MPD's Exceptions

MPD makes an exception that "[the Hearing Examiner] erred in finding that the Board has jurisdiction over these consolidated matters." (Exceptions at p. 5). Specifically, MPD "submits that [the Hearing Examiner] misinterpreted and misapplied [*AFSCME Local 2921 v. District of Columbia*, Slip Op. 339.] As a result, Respondent submits that [the Hearing Examiner's] jurisdictional finding should be reversed, and the Complaints in this consolidated

[5] In addition, the Hearing Examiner cites Board precedent in *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 46 D.C. Reg. 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1992).